Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1332

WILLIAM E. GOODMAN, *et al.*,
Petitioners,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, McDonnell Douglas Corporation, opposes petitioners' request for review by this Court and suggests that the questions presented by the petition are not sufficiently framed by the opinion below and are not of the requisite importance to justify a grant of certiorari by this Court.

JURISDICTION

Although Mr. Justice Blackmun granted an extension of time for filing the petition, the request for such an extension was made only on behalf of "William E. Goodman, *et al.*" Hence, it is questionable whether the extension granted runs to the remaining veterans, and thus the timeliness of the petition is doubtful as to all would-be petitioners except Goodman. In addition, the petition itself does not anywhere list or identify the petitioners, as required by the rules, and for this additional reason, it appears that the only petitioner who is properly before this Court is William E. Goodman. See STERN and GRESSMAN, SUPREME COURT PRACTICE §6.19 (5th ed. 1978). .

STATEMENT OF THE CASE

Beginning in the early 1950's, respondent McDonnell Douglas Corporation ("McDonnell") and the union representing its employees formulated a policy of dealing with veterans who, upon their return from military service, were entitled to re-employment and seniority rights under the Selective Service Act and its successor, the Veterans Re-employment Act, 38 U.S.C. §2021, *et seq.* (collectively referred to as "the Act"). At least as early as 1958 and many times thereafter, the United States Department of Labor advised McDonnell that its policy regarding returning veterans was in conformity with the statutory requirements and with court decisions.

There were 98 plaintiffs in the court below. Two of them were re-employed by McDonnell in 1967 upon the termination of their military service; 48 returned in 1968, 22 in 1969, 13 in 1970, 12 in 1971, and one in 1972. Thus, more than one-half of the plaintiffs were back at work with the Company by the end of 1968, and 72 of them had been reinstated by the end of 1969. All but five waited, however, until 1972-74 even to file administrative complaints with the Department of Labor regarding the application of McDonnell's re-employment policy to

them. The Labor Department, in turn, took from 1972 until September 1977 to investigate these administrative complaints and did not even initiate negotiations with McDonnell regarding the possible settlement of these complaints until June 1976.

This lawsuit was not filed until September 29, 1977. The trial court, in an opinion reported at 456 F. Supp. 874, dismissed the case on the basis of the equitable doctrine of laches, finding that McDonnell had shown both inexcusable delay in the filing of the action and prejudice resulting therefrom. Plaintiffs appealed to the Eighth Circuit, which in a unanimous opinion by then-Chief Judge Floyd R. Gibson reported at 606 F.2d 800, affirmed the dismissal. No petition for rehearing was filed.

Although the plaintiff-veterans had been represented in the trial and appellate courts by the Department of Justice, the Solicitor General decided that this case was not worthy of this Court's attention and, therefore, refused to endorse the filing of a certiorari petition on behalf of the plaintiffs. The petition, filed by private counsel, does not take issue with the prejudice prong of the laches holding but, rather, raises two questions concerning the Eighth Circuit's analysis of the inexcusability of the delay.*

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* Because the questions presented do not address the merits of this action, we deem it unnecessary to respond to the thinly veiled suggestions in the petition that McDonnell's re-employment policy was violative of the Act. Suffice it to say that the advancement of returning veterans was not automatic but required a post-discharge exercise of managerial discretion which rendered the policy legal in accordance with the Court's decision in *Tilton* v. *Missouri Pacific Railway Co.*, 376 U.S. 169 (1964). As noted, the policy was repeatedly blessed by the Labor Department as consistent with *Tilton* until its inexplicable and indefensible about-face in 1972, after nearly 15 years of acquiescence.

REASONS WHY THE PETITION SHOULD BE DENIED

As acknowledged by the Court of Appeals in its comprehensive and thoughtful opinion, this case "presents a special and extraordinary circumstance . . ." (Pet. App. A-17). Indeed, the record here reveals a case of bureaucratic procrastination and schizophrenia unrivaled in any other reported case. The factual backdrop against which the Court of Appeals ruled was such that the precedential effect of its ruling was quite limited. The esoteric nature of these facts suggests that the holding below is not likely to have any far-ranging significance, and its review by this Court is thus unwarranted.

The Court has held that the application of the doctrine of laches in a given instance is addressed to the sound discretion of the trial court. *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29 (1951); *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956). The application of the doctrine depends upon the "peculiar equitable circumstances" of each case, *Czaplicki* v. *The Hoegh Silvercloud, supra,* and the rule is to be applied so as to locate a just result in the context of the particular case. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 424-25 (1975). The opinion below is faithful to these principles and represents nothing more than an attempt to balance the equities as between two parties who have been disadvantaged by the actions of governmental officials. It can hardly be contended that either the trial court or the Court of Appeals used a defective scale or abused its discretion.

There are two elements to the equitable doctrine of laches: inexcusable delay and prejudice to the defendant. The petition does not deny the existence of prejudice. Instead, it focuses primarily on an alleged conflict among the circuits concerning the approach to the "inexcusable delay" aspect of the laches doctrine. To characterize the various opinions cited by the petition as a "conflict among the circuits," however, is to distort that concept and to invite a wholesale expansion of the use of

this Court's certiorari power. There is no conflict as to the elements of laches or as to the availability of that defense in this kind of case. Nor does the petition even suggest that application of a different rule would produce a different result here. At most, the courts have varied somewhat in their procedural approach to the laches analysis and have used slightly different methods of measuring the equities to gauge whether a certain delay has been inexcusable. This subject is, by nature, not susceptible to very many generalizations because, as noted, each case depends upon its own peculiar circumstances.

The first question presented by the petition—whether an analogous state statute of limitations can be applied under the Veterans Act in order to bar a claim under the doctrine of laches—is not even presented by the opinion of the Eighth Circuit. Chief Judge Gibson cited this Court's holding in *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946), emphasizing the flexibility of the laches doctrine, and he disavowed any resort to "mechanical rules" (Pet. App. A-9—A-11). He considered the statute of limitations as "merely one element in the congeries of factors to be considered in determining whether the length of delay was unreasonable and whether the potential for prejudice was great" (Pet. App. A-9). It is simply incorrect to characterize the opinion below as involving a "mechanical application" of any limitation period.

Moreover, even the cases which utilize the analogous statute do so only for the purpose of determining whether the burden of proof on the question of excusability should be shifted from defendant to plaintiff. None of those cases have employed the statute of limitations as an automatic bar. Thus, the first question presented by the petition is a non-issue. Additionally, since the opinion below is more favorable to these veterans on this issue than those taking a slightly different approach, the plaintiffs could not conceivably profit from a different resolution of that question.

The second of the questions presented—whether governmental delay can be attributed to the veterans—suffers similar infirmities. In the first place, even if the administrative delay by the Department of Labor is disregarded, laches would still bar plaintiffs' claim because of their own delay in presenting their complaints to the Department. Almost all of the plaintiffs who were re-employed by McDonnell after their military service from the years 1967 through 1971 made no complaints about the re-employment procedures that were applied to them. It was not until the period of 1972-74 that plaintiffs first began to voice irritation about their previous treatment. This inaction was incompatible with the statutory mandate and the case law announcing that "it is the duty of the veteran to promptly pursue his rights in courts." *Gruca* v. *United States Steel Corporation,* 495 F.2d 1252 (3d Cir. 1974). Instead of seasonably complaining about their treatment, plaintiffs acquiesced in McDonnell's policies and slept on any rights they might have had to challenge those policies for a protracted period of time. Delays of shorter duration have been held to constitute a bar to legal action. See *EEOC* v. *Liberty Loan Corporation,* 584 F.2d 853 (8th Cir. 1978); *Bell* v. *Aerodex, Inc.,* 473 F.2d 869 (5th Cir. 1973); *Blair* v. *Page Aircraft Maintenance, Inc.,* 467 F.2d 815 (5th Cir. 1972). Hence, even if the delay of the Labor Department were not attributable to plaintiffs, the result below would be the same. The second question presented, then, is more academic than dispositive in this case.

In addition, the Court of Appeals' attribution of governmental delay to the plaintiffs was fully justified under the aggravated facts of this case. The Act does not require veterans to submit their grievances to the administrative process, and thus they cannot be exculpated from the consequences of the extended delay resulting from their voluntary selection of that forum. *Organizations United for Ecology* v. *Bell,* 446 F. Supp. 535, 548 (M.D. Pa. 1978); *Cf. Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975). The veterans could have commenced litigation without the blessing or even the knowledge of

the government, but they chose to hand the ball to the Labor Department, obviously for the purpose of maximizing the pressure on McDonnell. That was, of course, an option open to them, but they cannot now be heard to contend that the resulting five-year, four-month delay was beyond their control and thus not chargeable against them. "Pursuit of permissive administrative remedies does not excuse unreasonable delay." *Steuer* v. *United States,* 207 Ct. Cl. 282, 295 (1975); *Vincin* v. *United States,* 468 F.2d 930 (Ct. Cl. 1972).

Plaintiffs chose to avail themselves of the right to free counsel afforded by the Act. If inordinate delay had been caused by privately retained counsel, plaintiffs of course would be charged with that delay. The result should not be otherwise simply because the veterans' lawyer works for the government.

Finally, the statement in the petition that the Eighth Circuit's ruling on this issue "is in direct conflict with decisions of other circuits" (Pet. 7) is simply inaccurate. The only cases cited in the petition are not appellate decisions. In reality, the ruling below is squarely in conformity with the views of the Third and Fifth Circuits—the only Courts of Appeals which have squarely addressed the issue—that the delay of the government should not be disregarded in determining the timeliness of any action brought under the Act. *Churma* v. *United States Steel Corporation,* 514 F.2d 589 (3d Cir. 1975); *Gruca* v. *United States Steel Corporation, supra; Bell* v. *Aerodex, Inc., supra; Blair* v. *Page Aircraft Maintenance, Inc., supra.* These courts have noted that the Act mandates a "speedy hearing" and seeks to provide a prompt remedy, and they have stressed that the purpose of preventing stale claims is to afford some protection to the employer. From the employer's perspective, it makes no difference whether the delay was caused by an individual or by the government, for the effect on him is the same. As the Third Circuit said in *Churma* v. *United States Steel Corporation, supra* at 594:

> ". . . a defendant is no less disadvantaged by the lapse of time merely because the lapse is occasioned by the department's inaction rather than the veteran's."

In sum, the ruling below correctly appraised the "special and extraordinary circumstance" of this case and held that the trial court did not abuse its discretion in applying the doctrine of laches. The petition for certiorari essentially seeks to involve this Court in a re-evaluation of the facts giving rise to the extensive delay, which both courts below found to be inexcusable. The Solicitor General properly concluded that this Court's resources should be devoted to more meaningful pursuits.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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